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No. 10-771

In the Supreme Court of the United States

NILSON HERNEY VALENCIA-RIASCOS, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 8 U.S.C. 1252(d)(1) requires issue exhaustion as a prerequisite to the court of appeals' exercise of jurisdiction over a petition for review of a decision of the Board of Immigration Appeals.

2. Whether application of 8 U.S.C. 1252(d)(1) in this case violated petitioner's right to due process under the Fifth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-2) is unreported. The opinions of the Board of Immigration Appeals (Pet. App. 3) and the immigration judge (Pet. App. 4-15) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 14, 2010. A petition for rehearing was denied on September 9, 2010 (Pet. App. 22). The petition for a writ of certiorari was filed on December 8, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that the Secretary of Homeland Security and the Attorney General may, in

their discretion, grant asylum to an alien who demonstrates that he is a "refugee" within the meaning of the INA. 8 U.S.C. 1158(b)(1)(A). The INA defines a "refugee" as an alien who is unwilling or unable to return to his country of origin "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A). An alien applying for asylum generally must file his application within one year of arriving in the United States. 8 U.S.C. 1158(a)(2)(B) and (D). The applicant bears the burden of demonstrating that he is eligible for asylum. 8 C.F.R. 1208.13(a), 1240.8(d). Once an alien has established asylum eligibility, the decision whether to grant or deny asylum is left to the discretion of the Attorney General or the Secretary of Homeland Security. 8 U.S.C. 1158(b)(1) and (2).

An alien also may be eligible for withholding of removal under the INA. See 8 U.S.C. 1231(b)(3)(A); 8 C.F.R. 1208.13(c)(1), 1208.16(a). Withholding of removal is available if the alien demonstrates that his "life or freedom would be threatened" in the country of removal "because of [his] race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1231(b)(3)(A). In order to establish eligibility for withholding of removal, an alien must prove a "clear probability of persecution" upon removal, a higher standard than that required to establish asylum eligibility. *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 430 (1987).

An alien also may obtain deferral of removal under regulations implementing United States obligations under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

(CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. 19 (1988), 1465 U.N.T.S. 85. To obtain this protection, an applicant must demonstrate, *inter alia*, that it is more likely than not that he would be subject to severe pain or suffering intentionally inflicted "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity" if removed to a certain country. 8 C.F.R. 1208.18(a)(1); see 8 C.F.R. 1208.16(c)(2).

b. Under the INA, administrative proceedings to determine whether an alien is entitled to remain in the United States typically begin before an immigration judge (IJ). 8 U.S.C. 1229a(a). After a hearing, the IJ issues a decision on the alien's removability and eligibility for relief from removal. 8 U.S.C. 1229a(c)(1)(A); 8 C.F.R. 1240.12(a). When the IJ enters an order of removal, he or she must "inform the alien of the right to appeal that decision." 8 U.S.C. 1229a(c)(5).

The Board of Immigration Appeals (Board) hears appeals from decisions of IJs. 8 C.F.R. 1003.1(b), 1240.15. A party that appeals to the Board "must identify the reasons for the appeal" and "must specifically identify the findings of fact, the conclusions of law, or both, that are being challenged." 8 C.F.R. 1003.3(b). If the Board affirms an IJ's order of removal, that order becomes final. 8 U.S.C. 1101(a)(47)(B).

An alien may seek judicial review of a final order of removal by filing a petition for review in the appropriate federal court of appeals. See 8 U.S.C. 1252(a)(1), (4) and (5). Under 8 U.S.C. 1252(d)(1), however, the court "may review a final order of removal only if * * * the alien has exhausted all administrative remedies available to the alien as of right."

2. Petitioner is a native and citizen of Colombia. Pet. App. 4. He entered the United States without authorization in June 2008. *Id.* at 4-5. He was charged with being removable as an alien present in the United States without having been admitted or paroled. *Ibid.*; Administrative Record (A.R.) 228-229; see 8 U.S.C. 1182(a)(6)(A)(i).

Petitioner sought asylum, withholding of removal, and CAT protection, contending that he would be persecuted and tortured on account of his political opinion if he was returned to Colombia. Pet. App. 5. Petitioner testified that his step-father was a fisherman and that petitioner worked as a sailor on his step-father's boat. *Ibid.* According to petitioner, one day guerillas from the Revolutionary Armed Forces of Colombia (FARC) boarded his step-father's boat and demanded that petitioner's step-father provide them with fish and fuel; petitioner's step-father refused, and several weeks later, he was found dead. *Id.* at 5-6. Petitioner stated that as a result of this incident, he feared harm from the FARC, and although he moved to different towns and cities in Colombia to avoid the FARC, he believed that the guerillas eventually would find him. *Id.* at 6-7. Petitioner also stated that he made a judicial complaint against the guerillas, but no action was taken by the police. *Id.* at 7. Petitioner acknowledged that he was never physically harmed or personally threatened by members of the FARC during his time in Colombia; that he and his step-father "had no involvement in political groups in Colombia"; and that petitioner "never joined any [of the] paramilitary group[s]" that opposed the FARC. *Id.* at 4-9, 13.

3. The IJ determined that petitioner is removable as charged and denied his requests for asylum, withholding

of removal, and CAT protection. Pet. App. 4-15. The IJ first held that petitioner failed to demonstrate a well-founded fear of persecution based on his political opinion. *Id.* at 10-11. The IJ explained that petitioner "never asserted any political opinion to the FARC and there is no reason why the FARC would attribute any particular political opinion to him," and that petitioner's step-father's murder was "because he refused to provide material aid or collaboration [to] the FARC" out of concern that it "would cause problems with the company for whom he worked," not "on account of his political opinion." *Ibid.* The IJ determined (*id.* at 11) that petitioner's claim was similar to the claim advanced in *INS* v. *Elias-Zacarias*, 502 U.S. 478 (1992), where the alien "asserted eligibility for [a]sylum based on threats received from guerilla groups when he refused to collaborate with them," and this Court held that the alien had not established persecution on account of his political opinion.

Although petitioner asserted that the only basis of his claim to asylum was political opinion, the IJ—because petitioner was proceeding pro se—considered whether petitioner was eligible for asylum or withholding of removal based on any other protected ground. Pet. App. 10-11. The IJ observed that "it could be argued that [petitioner] fears persecution on account of his membership in a particular social group" consisting of "relatives of his step-father or crew members on his step-father's boat," but the IJ determined that petitioner had not established a well-founded fear of persecution on either basis. *Id.* at 11-12. The IJ explained that "there is no indication that the other crew members on [petitioner's] step-father's boat suffered any reprisals from the FARC"; that petitioner's "other relatives, his

mother and sisters, continue to reside in Colombia" without incident; and that petitioner had not identified any male relatives who still lived in Colombia and faced threats from the FARC. *Id.* at 11. Accordingly, the IJ determined that petitioner has not "establish[ed] a nexus to a protected ground," and the IJ therefore denied his applications for asylum and withholding of removal. *Id.* at 12.

Finally, the IJ denied petitioner's request for CAT protection, explaining that petitioner had not shown that it was more likely than not that he would be tortured if he was returned to Colombia, or that such torture would be by or with the consent or acquiescence of the Colombian government. Pet. App. 12-14. The IJ then informed petitioner of his right to appeal the IJ's decision. A.R. 120-121.

4. Petitioner filed a notice of appeal with the Board, in which he stated that the IJ erred in holding that he failed to establish eligibility for asylum or withholding of removal based on a prospect of persecution because of his political opinion of opposition to the guerillas in Colombia. A.R. 24-26. Nowhere in his notice of appeal did petitioner claim eligibility for asylum or withholding of removal based on the distinct ground of his purported membership in a particular social group. Petitioner did not file a brief before the Board.[1]

The Board affirmed the decision of the IJ without issuing a separate opinion, making the IJ's decision the final agency determination. Pet. App. 3; see 8 C.F.R. 1003.1(e)(4).

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[1] Petitioner did not renew his CAT claim before the Board or make any separate argument in support of his CAT claim before the court of appeals. The CAT issue is not presented in his petition for a writ of certiorari, and accordingly it is not before this Court.

5. Petitioner filed a petition for review with the court of appeals. In his brief, petitioner argued that he had established eligibility for asylum and withholding of removal based on his membership in a particular social group consisting of the male relatives of his step-father. See Pet. C.A. Br. 13, 14-24. The government responded that the court of appeals lacked jurisdiction to consider this issue because petitioner had failed to present it to the Board, see Gov't C.A. Br. 8-13, and that in any event substantial evidence supported the IJ's conclusion that petitioner had not established a well-founded fear of persecution on account of a protected ground, see *id.* at 13-19. In his reply brief, petitioner argued that his failure to exhaust his particular social group claim "is not jurisdictional and the Court should excuse it" and that "any imposition * * * of a jurisdictional exhaustion requirement would deprive [him] of his Fifth Amendment Due Process right to fundamentally fair removal proceedings." Pet. C.A. Reply Br. 1; see *id.* at 2-27.

The court of appeals dismissed the petition for review in an unpublished, non-precedential opinion. Pet. App. 1-2. The court stated that "even construed liberally," petitioner's notice of appeal to the Board "provided the agency no notice that he was appealing the IJ's particular social group finding." *Id.* at 2. The court determined that petitioner's "failure to raise the particular social group issue before the [Board] constitutes a failure to exhaust administrative remedies" as required by 8 U.S.C. 1252(d)(1), and that failure to exhaust "depriv[es] [the court] of jurisdiction to entertain the claims raised in [petitioner's] petition for review." *Ibid.* (citing *Cordon-Garcia* v. *INS*, 204 F.3d 985, 988 (9th Cir. 2000), and *Barron* v. *Ashcroft*, 358 F.3d 674, 678 (9th Cir. 2004)).

6. Petitioner filed a petition for rehearing and rehearing en banc, which the court denied. Pet. App. 22.

ARGUMENT

Petitioner contends (Pet. 19-37) that the court of appeals erred in holding that his failure to present to the Board his claim of persecution based on his purported membership in a particular social group deprived the court of appeals of jurisdiction to decide that issue. Petitioner makes essentially three arguments: (1) that although 8 U.S.C. 1252(d)(1) requires exhaustion of remedies, it does not require an alien to present the particular issue on which he seeks judicial review to the Board; (2) that 8 U.S.C. 1252(d)(1) is not jurisdictional and therefore a court of appeals may excuse his failure to exhaust his administrative remedies; and (3) that if 8 U.S.C. 1252(d)(1) bars judicial review of his claim, it violates his Fifth Amendment right to due process. None of those arguments has merit. The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore unwarranted.

1. The court of appeals correctly held that the statutory requirement that aliens exhaust issues before the Board before presenting them to the court of appeals is mandatory and jurisdictional. Exhaustion doctrines generally "provide[] 'that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.'" *McKart* v. *United States*, 395 U.S. 185, 193 (1969) (quoting *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938)). As this Court has explained, requiring administrative exhaustion serves a number of important purposes, including "preventing premature interference

with agency processes"; allowing the agency to "function efficiently" and "correct its own errors"; providing the "parties and the courts the benefit of [agency] experience and expertise"; assuring the development of a record "adequate for judicial review"; and affording the agency an opportunity to decide whether a claim is "invalid" on other grounds or whether relief may be granted "under a different section of the Act." *Weinberger* v. *Salfi*, 422 U.S. 749, 765 (1975); accord *McKart*, 395 U.S. at 193-194. Where Congress has specified by statute that exhaustion is required, a court may not "dispense[ ]" with that requirement based on the court's own assessment that exhaustion would be "futil[e]." *Salfi*, 422 U.S. at 766; see, *e.g.*, *Booth* v. *Churner*, 532 U.S. 731, 741 n.6 (2001) (explaining that the Court "will not read futility or other exceptions into statutory exhaustion requirements where Congress has provided otherwise").

As relevant here, Congress has specified in the INA that a "court may review a final order of removal only if * * * the alien has exhausted all administrative remedies available to the alien as of right." 8 U.S.C. 1252(d)(1). By its plain terms, Section 1252(d)(1) makes clear that judicial review is not permitted unless the alien has exhausted his administrative remedies through an appeal to the Board. The statutory framework, which requires an IJ to advise an alien of his "right to appeal" a removal order, 8 U.S.C. 1229a(c)(5), allocates initial appellate review to the Board and makes such an appeal "available as of right" within the meaning of the exhaustion mandate in Section 1252(d)(1). That conclusion is reinforced by 8 U.S.C. 1101(a)(47)(B), which specifies that an IJ's removal order becomes final only upon affirmance by the Board or upon expiration of the ap-

peal period if no appeal to the Board is taken, whichever is earlier.

The statutory mandate of exhaustion serves to vest exclusive initial appellate jurisdiction in the agency. See *Bowles* v. *Russell*, 551 U.S. 205, 212-213 (2007) ("Because Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them."). As this Court recognized in *Bowles*, Congress has not authorized the federal courts to excuse non-compliance with statutory prerequisites to judicial review, and such judicially created exceptions "would no doubt detract from the clarity of the rule." *Id.* at 214.

Moreover, the relevant regulation confirms that exhaustion of administrative remedies means that the alien must have presented to the Board the particular issue he seeks to present to the court of appeals on petition for review. The regulation provides that in an appeal to the Board, the alien "must identify the reasons for the appeal" and "must specifically identify the findings of fact, the conclusions of law, or both, that are being challenged." 8 C.F.R. 1003.3(b). This requirement of issue exhaustion is consistent with the administrative-law principle that "[o]rdinarily an appellate court does not give consideration to issues not raised below." *Hormel* v. *Helvering*, 312 U.S. 552, 556 (1941); accord *Sims* v. *Apfel*, 530 U.S. 103, 112 (2000) (O'Connor, J., concurring) ("In most cases, an issue not presented to an administrative decisionmaker cannot be argued for the first time in federal court.").

Accordingly, to obtain judicial review of the IJ's determination that petitioner failed to establish eligibility for asylum based on an asserted prospect of persecution because of his purported membership in a particular

social group, petitioner was required to present that claim to the Board on appeal. He did not. Petitioner's notice of appeal did not challenge the IJ's particular social group finding; instead, it raised an entirely different claim for relief, stating that petitioner was eligible for asylum because he would be persecuted based on his *political opinion* if he were returned to Colombia. See A.R. 23-27. Petitioner did not file any separate brief to the Board in which he argued that he was eligible for relief from removal based on his membership in a particular social group. Indeed, petitioner did not even raise his particular social group claim before the IJ; it was the IJ, not petitioner, who suggested—and rejected—such a claim. See Pet. App. 10-11. Because petitioner did not advance the claim that he would be persecuted because he is a member of a particular social group consisting of male members of his step-father's family at any stage before the agency, the court of appeals lacked jurisdiction to consider that claim under 8 U.S.C. 1252(d)(1). See Pet. App. 2.

2. Petitioner contends (Pet. 9-15) that although Section 1252(d)(1) requires exhaustion of administrative remedies, that does not mean he was required to present the particular issue on which he seeks judicial review to the Board. Petitioner's view is belied by the plain text of the statute and the regulations, which make clear that an alien must present to the Board any issue he seeks to present on petition for review in the courts of appeals. See pp. 8-10, *supra*. It is also inconsistent with the long-standing and uniform view of the courts of appeals that Section 1252(d)(1)'s exhaustion of remedies requirement means the alien must present each issue on which he seeks judicial review to the Board. Although there is some divergence in the courts of appeals regarding

whether the exhaustion requirement is jurisdictional or simply mandatory (see pp. 15-18, *infra*), petitioner has not identified any decision holding that Section 1252(d)(1) does not require issue exhaustion. To the contrary: Because the Board's "regulations * * * require issue exhaustion," the courts of appeals have "long held that issue exhaustion is mandatory." *Zhong* v. *United States Dep't of Justice*, 489 F.3d 126, 131 (2d Cir. 2007) (Calabresi, J., concurring in the denial of rehearing en banc); see, *e.g.*, *Etchu-Njang* v. *Gonzales*, 403 F.3d 577, 582-583 (8th Cir. 2005) (citing cases).[2]

Contrary to petitioner's contention (Pet. 12-13), this Court's decision in *Sims* v. *Apfel*, *supra*, does not support his view. In *Sims*, the Court held that a Social Security claimant who has been denied benefits by an administrative law judge must seek review of that denial

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[2] Prior to 1996, the INA included a substantially similar exhaustion provision, which provided that an order of deportation or exclusion "shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations." 8 U.S.C. 1105a(c) (1994). The courts of appeals likewise interpreted that provision as requiring exhaustion of the issues an alien seeks to raise on petition for review as a prerequisite for judicial review of those issues. See *Ravindran* v. *INS*, 976 F.2d 754, 761 (1st Cir. 1992); *Alleyne* v. *INS*, 879 F.2d 1177, 1182 (3d Cir. 1989); *Pierre* v. *INS*, 932 F.2d 418, 421 (5th Cir. 1991), overruled on other grounds by *Stone* v. *INS*, 514 U.S. 386 (1995); *Perkovic* v. *INS*, 33 F.3d 615, 619-620 (6th Cir. 1994); *Mojsilovic* v. *INS*, 156 F.3d 743, 748 (7th Cir. 1998); *Margalli-Olvera* v. *INS*, 43 F.3d 345, 350 (8th Cir. 1994); *Vargas* v. *INS*, 831 F.2d 906, 907-908 (9th Cir. 1987); *Asencio* v. *INS*, 37 F.3d 614, 615-616 (11th Cir. 1994). This "longstanding acceptance by the courts" that issue exhaustion is mandated by the INA, "coupled with Congress' failure to reject" that interpretation, provides additional support for the view that 8 U.S.C. 1252(d)(1) mandates issue exhaustion as a jurisdictional prerequisite to judicial review of agency action. *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 733 (1975).

by the Social Security Appeals Council, but his failure to present a particular issue to the Appeals Council does not waive judicial review of that issue. *Id.* at 105, 108-110, 112. The Court explained that issue exhaustion may be required by statute or regulation. Specifically, the Court noted that although "requirements of administrative issue exhaustion are largely creatures of statute," "it is common for an agency's regulations to require issue exhaustion in administrative appeals," and "when regulations do so, courts reviewing agency action regularly ensure against the bypassing of that requirement by refusing to consider unexhausted issues." *Id.* at 107-108. The Social Security regulations at issue in *Sims* "d[id] not require issue exhaustion" (*id.* at 108), and thus the Court concluded that the claimant's failure to raise an issue before the Appeals Council did not preclude judicial review of the issue. Here, by contrast, the applicable regulation clearly does require issue exhaustion, see 8 C.F.R. 1003.3(b), and thus issue exhaustion is required.[3] Indeed, the *Sims* Court explained that "the ra-

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[3] In *Sims*, the Court cited a Department of Labor regulation pertaining to petitions for review of employee benefits decisions before the Benefits Review Board as an example of an agency regulation that clearly requires issue exhaustion in administrative appeals. See 530 U.S. at 108. That regulation provides that "the petitioner shall submit a petition for review to the Board which petition lists the specific issues to be considered on appeal." 20 C.F.R. 802.211(a), see also 20 C.F.R. 802.211(b) ("[e]ach petition for review shall be accompanied by a supporting brief, memorandum of law or other statement which: Specifically states the issues to be considered by the Board."). The regulation pertaining to appeals to the Board of Immigration Appeals from immigration judge decisions closely mirrors that language. It provides that an alien appealing to the Board "must identify the reasons for the appeal" and "must specifically identify the findings of fact, the conclusions of law, or both, that are being challenged." 8 C.F.R. 1003.3(b).

tionale for requiring issue exhaustion is at its greatest" in "an adversarial administrative proceeding," 530 U.S. at 110, like the one petitioner had before the Board. Thus, rather than support petitioner's view, *Sims* confirms the correctness of the court of appeals' decision.[4]

Petitioner is also mistaken in relying (Pet. 14-15) on this Court's decision in *Kucana* v. *Holder*, 130 S. Ct. 827 (2010), to support his argument that Section 1252(d)(1) does not require issue exhaustion. *Kucana* concerned the interpretation of a provision of the INA that precludes judicial review of certain discretionary determinations by the Attorney General or the Secretary of Homeland Security. That provision, 8 U.S.C. 1252(a)(2)(B)(ii), states that "no court shall have jurisdiction to review" any decision "the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security." See *Kucana*, 130 S. Ct. at 831. The question in *Kucana* was whether a specification of discretion in a

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[4] This Court's recent decision in *Henderson* v *Shinseki*, No. 09-1036, 2011 WL 691592 (Mar. 1, 2011), likewise does not support petitioner's argument. In *Henderson*, the court concluded that the filing deadline for a notice of appeal in the Court of Appeals for Veterans Claims is not jurisdictional, because the provision setting forth that deadline "does not speak in jurisdictional terms" and "the review scheme that Congress created for the adjudication of veterans' benefits claims" reflects a particular solicitude for veterans and does not share key characteristics of adversarial administrative proceedings. *Id.* at *8-*9 (internal quotation marks omitted). Here, by contrast, Section 1252(d)(1) does speak in jurisdictional terms, stating that the courts of appeals "may review" a removal order only when the alien has exhausted his administrative remedies, 8 U.S.C. 1252(d)(1), and immigration proceedings are administrative adversarial proceedings, see *Henderson*, 2011 WL 691592, at *7 (contrasting the veterans' benefits scheme with judicial review of agency decisions under the INA)

regulation was a specification of discretion "under this subchapter"; the Court held it was not. *Ibid.* The *Kucana* Court did not address Section 1252(d)(1) or exhaustion of remedies generally, and it did not hold that issue exhaustion must be stated in a statute, as opposed to a regulation. It therefore provides no support for petitioner here.[5]

3. Petitioner next contends (Pet. 17-20) that certiorari is warranted to resolve disagreement in the courts of appeals regarding whether the exhaustion requirement in Section 1252(d)(1) is jurisdictional. He is mistaken. Although there is some variance in the courts of appeals on that issue, resolution of the issue would not affect petitioner's claim, because even the court of appeals that has deemed Section 1252(d)(1)'s exhaustion requirement non-jurisdictional has held that exhaustion is still mandatory.

Ten courts of appeals have held that issue exhaustion is mandatory and jurisdictional. See *Sousa* v. *INS*, 226 F.3d 28, 31-32 (1st Cir. 2000); *Xie* v. *Ashcroft*, 359 F.3d 239, 245 n.8 (3d Cir. 2004); *Massis* v. *Mukasey*, 549 F.3d 631, 638-640 (4th Cir. 2008), cert. denied, 130 S. Ct. 736 (2009); *Omari* v. *Holder*, 562 F.3d 314, 318-319 (5th Cir. 2009); *Ramani* v. *Ashcroft*, 378 F.3d 554, 559-560 (6th Cir. 2004); *Mojsilovic* v. *INS*, 156 F.3d 743, 748-749 (7th Cir. 1998); *Etchu-Njang*, 403 F.3d at 582-583; *Barron* v. *Ashcroft*, 358 F.3d 674, 678 (9th Cir. 2004) (cited in Pet. 2); *Garcia-Carbajal* v. *Holder*, 625 F.3d 1233, 1236-1240 (10th Cir. 2010); *Fernandez-Bernal* v. *Attorney Gen.*, 257 F.3d 1304, 1317 n.13 (11th Cir. 2001); see also Pet. 17 (acknowledging that "most courts of appeals inter-

[5] *Arbaugh* v. *Y&H Corp*, 546 U.S. 500 (2006) (discussed at Pet. 26-28) likewise did not consider the exhaustion requirement in Section 1252(d)(1), and it therefore provides no support for petitioner here.

pret the immigration case issue exhaustion requirement as being jurisdictional").[6]

Petitioner contends (Pet. 16) that the Second Circuit held that Section 1252(d)(1) is not jurisdictional, citing *Zhong* v. *United States Dep't of Justice*, 480 F.3d 104 (2007). It is true that in *Zhong*, the Second Circuit held that issue exhaustion is mandatory in immigration cases, but is not jurisdictional, in the sense that although the court will not excuse an alien's failure to raise an issue to the Board if the government objects, the government may waive the requirement of issue exhaustion, allowing the court to "review * * * arguments not previously made to the [Board]." *Id.* at 120-124. But in a decision issued after *Zhong*, the Second Circuit held that Section 1252(d)(1) "is jurisdictional, not merely mandatory." *Grullon* v. *Mukasey*, 509 F.3d 107, 111-112 (2007). (In that case, an alien who was denied relief by the IJ filed a habeas corpus petition in federal court rather than appeal to the Board. *Id.* at 109-110.) These decisions are not necessarily irreconcilable; one could perhaps say

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[6] Petitioner suggests (Pet. 18) that there may be some intra-circuit disagreement on this issue in the Seventh and Eighth Circuits. It is true that the Seventh Circuit recently has suggested that an alien's failure to exhaust is not "a jurisdictional rule in the strict sense" but instead is "a case-processing rule that limits the arguments available to an alien in this court." *Issaq* v. *Holder*, 617 F.3d 962, 968 (2010). But that does not help petitioner, because an intra-circuit disagreement is not a basis for this Court's review, see Sup. Ct. R. 10, and even if Section 1252(b)(1) sets forth only a "claims-processing rule," it still would prevent petitioner from presenting his unexhausted claim to the Seventh Circuit. Similarly, although the Eighth Circuit has suggested that some exceptions might be allowed to Section 1252(b)(1), see *Mambwe* v. *Holder*, 572 F.3d 540, 550 (2009), any intra-circuit confusion does not justify this Court's review, and petitioner has not shown he fits within any exception suggested by the Eighth Circuit.

that the requirement of an appeal to the Board is jurisdictional and cannot be waived (*Grullon*), but that the requirement of issue exhaustion is not jurisdictional and may be waived (*Zhong*). See also *Massis*, 549 F.3d at 639 (noting uncertainty in Second Circuit law). But either way, it would not provide relief for petitioner, because even if the requirement of issue exhaustion could be waived, the government clearly has not waived it here.

Here, unlike in *Zhong*, the government objected in the court of appeals to petitioner's attempt to raise an issue he did not present to the Board. See Gov't C.A. Br. 8-13. Accordingly, the Second Circuit would recognize that Section 1252(d)(1) bars consideration of petitioner's claim. As the *Zhong* court made clear, its decision in that case "does not mean * * * that petitioners seeking review of their removal orders are ordinarily excused from issue exhaustion"; "[q]uite the contrary," "failure to exhaust specific issues before the [Board] is no more than an affirmative defense subject to waiver" by the government. 480 F.3d at 122, 124. Thus, even if the exhaustion requirement in Section 1252(d)(1) was not jurisdictional (in the absolute sense that it could not be waived by the government), it would still be mandatory, and thus would bar petitioner's claim. See *Greenlaw* v. *United States*, 128 S. Ct. 2559, 2564-2567 (2008) (declining to decide whether a statutory requirement that the government appeal or cross-appeal a criminal sentence is "jurisdictional," but recognizing no judicial discretion to make exceptions to that requirement); *Eberhart* v. *United States*, 546 U.S. 12, 18 (2005) (per curiam) (explaining that, even when a time limit in a procedural rule is not "jurisdictional," the court's duty to apply it is "mandatory" when the other party raises

an objection). Because petitioner could not prevail even under the Second Circuit's approach in *Zhong* (an approach that may have been modified by its later decision in *Grullon*), this case would not be an appropriate one to consider the minor disagreement in the circuits.

4. Petitioner contends (Pet. 35-37) that denying him judicial review of his unexhausted claim would violate due process. Significantly, petitioner has not identified any court that has accepted the view that application of the issue exhaustion requirement in Section 1252(d)(1) violates due process. And it does not. In the immigration context, due process generally requires that the alien be provided a meaningful opportunity to be heard. See *Gutierrez-Berdin* v. *Holder*, 618 F.3d 647, 654 (7th Cir. 2010) ("if an applicant in an immigration court has not received a meaningful opportunity to be heard, she has been denied due process") (internal quotation omitted); *Pena-Muriel* v. *Gonzales*, 489 F.3d 438, 444 (1st Cir. 2007) ("[D]ue process requires that the alien received notice of the charges against him, and a fair opportunity to be heard before an executive or administrative tribunal."), cert. denied, 129 S. Ct. 37 (2008).

Here, petitioner was afforded two levels of agency review—a hearing before the IJ and an appeal to the Board—thus providing him with ample opportunity to be heard on his claims. That petitioner chose to raise only a claim of persecution on account of political opinion—and not the entirely different claim of persecution based on membership in a particular social group—does not make his proceeding fundamentally unfair. Petitioner was heard on all claims he brought to the agency, and the IJ even considered some possible claims (such as a possible particular social group claim) that petitioner himself had not made. Had he presented the particular

social group claim to the Board, petitioner also could have obtained judicial review of that claim. Accordingly, there is no due process violation here.

5. This case would be a poor vehicle to consider the questions presented because even if the court of appeals could decide petitioner's claim, the claim would fail on the merits. If the court of appeals could review petitioner's claim, it would do so under the "substantial evidence" standard, *INS* v. *Elias-Zacarias*, 502 U.S. 478, 481 (1992), and the agency's factual determinations would be "conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary," 8 U.S.C. 1252(b)(4)(B).

On this record, petitioner could not show that the IJ's conclusion that he failed to establish a well-founded fear of persecution based on his membership in a particular social group was not supported by substantial evidence. Indeed, because petitioner never advanced any argument in support of this claim before the agency, he did not adduce evidence in support of the argument that there exists a group of male relatives of his step-father in Colombia, and that members of that group face persecution by the FARC due to their relationship to petitioner's step-father. See Pet. App. 12 (finding petitioner's "analysis of the situation * * * somewhat speculative" and stating that "it is unclear to what extent [petitioner's] step-father may have other male relatives still living in Colombia"). Before the court of appeals, petitioner argued that he would be persecuted by the FARC on account of his relationship to his step-father if returned to Colombia, Pet. C.A. Br. 14-17; but even taking that as true, it does not demonstrate that petitioner is a member of a social group that would be targeted by the FARC. See, *e.g.*, *In re A-M-E- & J-G-U-*,

24 I. & N. Dec. 69, 73-74 (B.I.A. 2007) (determination of what constitutes a "particular social group" is fact-intensive; *inter alia*, "members of a particular social group must share a common, immutable characteristic"; "the shared characteristic of the group should generally be recognizable by others in the community"; and the group must be "defined with the requisite particularity"); see also *In re Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985), overruled in part on other grounds by *In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987). Indeed, petitioner testified that his mother and sisters have been able to remain in Colombia. Pet. App. 11. Accordingly, there is no reasonable prospect that petitioner could prevail on his claim for asylum or withholding of removal. Further review is therefore unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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